

NO. 2470

In the United States Circuit Court of
Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

JESSIE B. BOSHAUT, AS ADMINISTRATRIX OF THE ES-
TATE OF AMANIUEL BOSHAUT, DECEASED, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
CENTRAL DIVISION

BRIEF FOR THE APPELLANT

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PAUL P. O'BRIEN,
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**In the United States Circuit Court of
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JESSIE B. BOSCHART, AS ADMINISTRATRIX OF THE ES-
TATE OF AMANIUEL BOSCHART, DECEASED, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
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CENTRAL DIVISION*

BRIEF FOR THE APPELLANT

STATEMENT OF THE CASE

This is an appeal by the Government from a judgment for the plaintiff, Jessie B. Boshart, administratrix of the estate of Amaniuel Boshart, deceased, in a suit to recover permanent total disability benefits under a United States Government life (converted) insurance contract.

Suit was originally filed December 30, 1932, by Amaniuel Boshart, the plaintiff's decedent, on a five-year convertible term policy of United States Government life insurance in the sum of \$10,000, into which he had converted a contract of war risk

yearly renewable term insurance on April 1, 1927. He sought to recover permanent total disability benefits and a refund of all premiums paid from and after April 21, 1932, alleging due proof and a disagreement (R. 3-5).

The Government's answer denied the allegations as to disability, but admitted all other material allegations (R. 7-9).

Thereafter the insured died, and his widow, Jessie B. Boshart, filed an amended and supplemental complaint, as administratrix of his estate, in which she alleged that the insured became permanently and totally disabled either on April 21, 1932 (as he had previously alleged), or on November 17, 1933. She also alleged due proof and a disagreement, and sought to recover monthly payments of \$57.50 from the date of permanent total disability, together with a refund of all premiums paid by the insured subsequent to that date (R. 9-11).

The Government filed an answer denying the allegations of disability, due proof and disagreement (R. 12-15).

The case was tried before the court on a written waiver of jury trial (R. 16). The policy was put in evidence,¹ together with proof that the insured

¹ Certain portions of the policy were omitted from the record, as printed, but counsel agreed, and the lower court ordered that the entire policy should be considered as incorporated in the bill of exceptions and separately certified to this Court by the clerk of the court below (R. 39, 46-47).

had made claim for permanent total disability benefits, and that such claim had been denied by the defendant (R. 33-39). The plaintiff also introduced in evidence (R. 25) a letter to her attorney from the Acting Solicitor of the Veterans' Administration, dated September 7, 1934, stating that the insured had died December 23, 1933, while his claim was being reviewed by the Veterans' Administration; that in view of his death, no advantage would be gained in seeking a permanent and total disability rating for insurance purposes; that under the terms of the policy as construed by the Comptroller General in a decision rendered June 27, 1922 (1 Comp. Gen. 767), even if such a rating were to be made, no portion of the insurance would be payable to the estate of the insured, nor could there be a refund of the premiums paid prior to his death. The letter further stated, however, that as soon as the litigation in this case is terminated, the full amount of the insurance would be awarded to the insured's widow (the plaintiff) and his daughter, as the beneficiaries designated in the policy (R. 26-28).²

² Plaintiff also put in evidence a prior letter from the Chief Attorney of the Veterans' Administration at Los Angeles, to the Acting Solicitor (R. 29-30), suggesting a review of the claim and stating his opinion to be that if permanent and total disability were found, disability benefits would be payable, and "there would of necessity be a refund of premiums due subsequent to" the beginning of the disability (R. 31).

The defendant requested various findings of fact and conclusions of law (R. 22-25, 32-33), and moved for judgment on the ground, among others, that where no payments of disability benefits had been made to the insured during his lifetime and the policy matured as a death claim, the insured's personal representative is barred from the recovery of disability benefits or refund of premiums under the terms of the policy. The court overruled the defendant's motion, found in favor of plaintiff, and allowed the defendant an exception (R. 40-41). Findings of fact, conclusions of law, and judgment for the plaintiff were thereupon entered (R. 16-21), finding that the insured became permanently totally disabled November 5, 1932; that he had submitted due proof thereof to the defendant on the same date, and awarding to the plaintiff benefits "in accordance with the terms of [(the)]* policy * * * at the rate of \$57.50 per month commencing on the 5th day of November, 1932", together with all premiums paid by the insured subsequent to November 5, 1932.

SPECIFICATION OF ERRORS RELIED UPON

The appellant relies upon the following assignments of error:

IV

That the Court erred in its refusal to grant defendant's motion for judgment upon the ground that where no payments of

disability benefits were paid to the insured during his lifetime, and the policy matured as a death claim at death that the insured's personal representative is barred from the recovery of disability benefits, or the refund of premiums by reason of the terms of the policy insured upon (R. 50).

IX

That the Court erred in awarding permanent and total disability benefits to the plaintiff.

X

That the Court erred in awarding to the plaintiff all moneys paid by plaintiff's decedent to defendant as insurance premiums subsequent to November 5, 1932.

XI

That the Court erred in the substitution of Jessie B. Boshart, administratrix of the estate of Amanuel Boshart, deceased, as party plaintiff (R. 56).

QUESTIONS PRESENTED

Whether or not the personal representative of a deceased insured under a Government life insurance policy is entitled to (a) permanent total disability benefits which were not paid to the insured during his lifetime; and (b) a refund of premiums paid by the insured on his policy between the date of permanent total disability and death.

STATUTES INVOLVED

The policy here in suit was issued pursuant to Section 301 of the World War Veterans' Act, 1924, as amended by the Act of June 2, 1926, c. 449, 44 Stat. 686 (38 U. S. C. 512), which provides, in part:

Except as provided in the second paragraph of this section, not later than July 2, 1927, all term yearly renewable insurance held by persons who were in the military service after April 6, 1917, shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, five-year level premium term, and into other usual forms of insurance, and for reconversion of any such policies to a higher premium rate in accordance with regulations to be issued by the director, and shall prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each, and may be deducted from the pay or deposit of the insured or be otherwise made at his election.

* * * * *

The insurance except as provided herein shall be payable in two hundred and forty

equal monthly installments: * * * Provisions for maturity at certain ages, for continuous installments during the life of the insured or beneficiaries, or both, for cash, loan, paid up and extended values, dividends from gains and savings, and such other provisions for the protection and advantage of and for alternative benefits to the insured and the beneficiaries as may be found to be reasonable and practicable, may be provided for in the contract of insurance, or from time to time by regulations. All calculations shall be based upon the American Experience Table of Mortality and interest at 3½ per centum per annum, except that no deduction shall be made for continuous installments during the life of the insured in case his total and permanent disability continues more than two hundred and forty months. Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries without the consent of such beneficiary or beneficiaries, but only within the classes herein provided.

If no beneficiary within the permitted class be designated by the insured as beneficiary for converted insurance granted under the provisions of Article IV of the War Risk Insurance Act, or Title III of this Act, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, then

there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of converted insurance payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments: *Provided*, That no payments shall be made to any estate which under the laws of the residence of the insured or the beneficiary, as the case may be, would escheat, but same shall escheat to the United States and be credited to the United States Government life insurance fund.

The bureau may make provision in the contract for converted insurance for optional settlements, to be selected by the insured, whereby such insurance may be made payable either in one sum or in installments for thirty-six months or more. The bureau may also include in said contract a provision authorizing the beneficiary to elect to receive payment of the insurance in installments for thirty-six months or more, but only if the insured has not exercised the right of election as hereinbefore provided; and even though the insured may have exercised his right of election the said contract may authorize the beneficiary to elect to receive such insurance in installments spread over a greater period of time than that selected by the insured. * * *

PERTINENT PROVISIONS OF THE POLICY

PREMIUM

This insurance is granted in consideration of * * * the payment of the monthly premium of \$9.20 on the 1st day of each month * * * during the lifetime of the Insured except as hereinafter provided.

MODE OF PAYMENT AT DEATH OR DISABILITY

This insurance is payable in monthly installments of \$57.50 (hereinafter called the monthly installment in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected.

20. OPTIONAL SETTLEMENTS IN LIEU OF MONTHLY INSTALLMENTS OF \$5.75, PAYABLE ON THE DEATH OF THE INSURED UNDER THE TERMS OF THIS POLICY, SUBJECT TO THE BENEFICIARY PROVISIONS HEREOF

OPTION ONE

Insurance Payable in One Sum.—Settlement under this option will be made only when selected by the Insured during his lifetime or by his last will and testament. When such selection has been made, \$1,000 will be payable in one sum at the maturity of this policy by death.

* * * * *

BENEFICIARY

This insurance, subject to the beneficiary provisions hereof, is payable to JESSIE BELL BOSHART, HIS WIFE, AND EDNA LUCILE BOSHART, HIS DAUGHTER: SHARE AND SHARE ALIKE, hereinafter called the beneficiary, IN ONE SUM.

DISABILITY BENEFITS TO INSURED

Upon due proof of the total permanent disability of the Insured while this policy is in force, the monthly installments shall, except as hereinafter provided, be payable to the Insured and continue to be so payable during total permanent disability *so long as he lives*, and payment of all premiums due after receipt of such proof during total permanent disability shall be waived.

DEATH BENEFITS TO BENEFICIARY

Upon due proof of the death of the Insured while this policy is in force, the monthly installments, without interest, which have accrued since the death of the Insured, the first installment being due on the date of the death of the Insured, shall be paid to the beneficiary designated, and thereafter the payment of the monthly installments shall continue to be so payable until two hundred and forty installments in all, including any *paid* to the Insured during his lifetime on account of total permanent disability, shall have been paid; but if two

hundred and forty or more installments shall have been paid to the Insured on account of total permanent disability, no death benefit shall be payable. If Optional Settlement 1, 2, or 3 has been selected, payment shall be made accordingly, subject to deduction on account of disability *payments*.

* * * * *

PAYMENT OF PREMIUMS

(a) Premiums may be paid annually, semiannually, or quarterly, in advance, * * *. At maturity by death or otherwise, the discounted value at three and one-half per centum per annum of the premiums paid in advance beyond the current calendar month shall be refunded to the Insured, *if living; otherwise to the beneficiary*.

* * * * *

INDEBTEDNESS AT MATURITY OF POLICY

8. *At the maturity of this policy by total permanent disability or death, any indebtedness, unless paid off in cash, shall be liquidated by reducing the monthly installment in the proportion which the indebtedness bears to the commuted value of the monthly installments, as may then be payable hereunder, excluding dividend accumulations. If the policy shall be payable in one sum at death, any indebtedness shall be deducted from the amount payable under the policy.*

* * * * *

TOTAL PERMANENT DISABILITY

11. * * * The total permanent disability benefits may relate back to a date not exceeding six months prior to receipt of due proof of such total permanent disability, and *any premiums paid after receipt of due proof of total permanent disability, and within the six months, shall be refunded without interest.*

(a) Without prejudice to any other cause of disability, the permanent loss of the use of both feet, or both hands, or of both eyes, or of one foot and one hand, or of one foot and one eye, or of one hand and one eye, or the loss of hearing of both ears, or becoming permanently helpless or permanently bedridden, shall be deemed to be total permanent disability; and monthly installments for any of these specifically enumerated causes of total permanent disability shall accrue from the date of such total permanent disability, and *any premiums paid after the date of such total permanent disability shall be refunded without interest.*

RECOVERY FROM DISABILITY

12. Notwithstanding proof of total permanent disability may have been accepted as satisfactory, the Insured shall at any time, on demand, furnish proof satisfactory to the Director of the United States Veterans' Bureau of the continuance of such total permanent disability, and *if the Insured shall fail to furnish such proof, all payments of*

monthly installments on account of such total permanent disability hereunder shall cease, and all premiums thereafter falling due shall be payable in conformity with this policy. Thereafter, the premium to be paid, and the cash values, paid-up insurance values, and loan values shall be reduced so that the resulting premium and values shall bear the same proportion to the premium and values, respectively, specified hereon, that the commuted value of the installments (two hundred and forty less the number paid) bears to the commuted value of two hundred and forty installments. The extended-insurance values shall be modified accordingly.

TOTAL PERMANENT DISABILITY BENEFITS UNDER
PAID-UP INSURANCE

13. If one or more monthly installments be paid on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at the death of the Insured the remaining unpaid installments (two hundred and forty less the number *paid*). If an optional settlement has been selected, payment shall be made accordingly.

* * * * *

ASSIGNMENT

15. * * * The proceeds of this policy shall not be subject to the claims of creditors of the Insured or creditors of any benefi-

ary to whom the proceeds may be awarded, except claims of the United States arising under the War Risk Insurance Act or the World War Veterans' Act.

ARGUMENT

The Government has no substantial monetary interest in this suit, but does have "a real and substantial interest" in making payment according to the terms of the policy (*Ramsey v. United States*, 61 F. (2d) 444 (C. C. A. 5th), in this and other cases which may be controlled by the decision of this Court. Moreover, the judgment of the District Court, in awarding benefits to the plaintiff in her capacity of personal representative of the insured, is in conflict with a long-continued and consistent practice which has been followed by the Veterans' Administration and its predecessors in administering Government life insurance, pursuant to decisions of the Comptroller General.

The plaintiff as administratrix of the insured's estate is not, it is submitted, entitled, under the terms of the policy, to any of the proceeds of the insurance or of the premiums paid by the insured. The policy clearly provides, we submit, in the event of the death of the insured, that the designated beneficiaries are alone entitled to all sums payable under its terms, whether as insurance benefits or in refund of premiums.

In the paragraph entitled "Mode of Payment at Death or Disability" (R. 34), it is provided that

the insurance is payable in "monthly installments of \$57.50 (hereinafter called the monthly installment) in the event of the total permanent disability of the Insured or of his death, unless one of the Optional Settlements is selected as hereinafter provided, then, in the event of the death of the Insured this insurance is payable in accordance with the Optional Settlement so selected." The insured in the instant case selected Option No. 1, which provided for payment in a lump sum, and designated his wife (the plaintiff) and his daughter as the beneficiaries (R. 35).

In the paragraph entitled "Disability Benefits to the Insured" (R. 35), it was provided that upon due proof of total permanent disability, "the monthly installments shall, except as hereinafter provided, be payable *to the Insured* and continue to be so payable during total permanent disability *so long as he lives * * **" The next succeeding paragraph, entitled "Death Benefits to Beneficiary" (R. 36), provides for the payment *to the beneficiary* of "the monthly installments, * * * which have accrued since the death of the Insured, * * * until two hundred and forty installments in all, including any *paid* to the Insured during his lifetime on account of total permanent disability, shall have been paid;" but that if one of the three optional settlements has been selected, "payment shall be made accordingly, subject to deduction on account of disability *payments.*"

To the same effect is a subsequent paragraph relating to "paid-up" insurance (R. 38), which provides that if installments have been paid "on account of total permanent disability incurred under a paid-up insurance, then there shall be paid to the beneficiary upon the surrender of this policy at the death of the Insured the remaining *unpaid* installments (two hundred and forty less the number *paid*). If an optional settlement has been selected, payment shall be made accordingly."

The exception provided in the paragraph entitled "Disability Benefits to Insured" (R. 35) that, upon due proof of total permanent disability, the monthly installments shall "except as hereinafter provided" be payable to the insured so long as he lives, evidently refers to paragraph 12 of the policy, entitled "Recovery from Disability" (R. 37-38), which provides in effect that, notwithstanding proof of total permanent disability may have been accepted as satisfactory, if the insured shall, upon demand at any time, fail to furnish proof of the continuance of such disability, "all payments of monthly installments on account of such total permanent disability hereunder shall cease * * *." The exception was no doubt also intended to refer to the provisions for a reduction of the monthly installment in the event that any indebtedness should exist at the maturity of the policy by permanent total disability (paragraph 6, entitled "Indebtedness at Maturity").

In short, the policy provides that the insurance shall be payable in monthly installments to the insured during total permanent disability "so long as he lives", but at his death, the beneficiaries shall be entitled to all of the remaining insurance excepting only the installments actually "paid" to the insured himself during his lifetime on account of total permanent disability. Payment of any of the proceeds of the insurance to the insured's personal representative or anyone else, except the beneficiaries, is manifestly excluded, unless the words "paid" and "payments" in the provision for the payment of death benefits (R. 36) are to be construed as referring to installments due and *unpaid* to the insured as well as to those which were in fact paid. But to attribute such a meaning to the policy would necessarily involve either forcing from the words in question unusual and unnatural meanings or interpolating other words which are not contained in the policy. To do either would be contrary to well settled rules applicable to the construction of contracts. In *Harrison v. Fortlage*, 161 U. S. 57, 63, it is said in this connection:

The court is not at liberty, either to disregard words used by the parties, descriptive of the subject matter, or of any material incident, or to insert words which the parties have not made use of. *Norrington v. Wright*, 115 U. S. 188; *Filley v. Pope*, 115 U. S. 213; *Watts v. Camors*, 115 U. S. 353; *Cleveland Rolling Mill v. Rhodes*, 121

U. S. 255; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510; *Bowes v. Shand*, 2 App. Cas. 455; *Welsh v. Gossler*, 89 N. Y. 540; *Cunningham v. Judson*, 100 N. Y. 179; *Iasigi v. Rosenstein*, 141 N. Y. 414.

Moreover, in *Bergholm v. Peoria Life Ins. Co.*, 284 U. S. 489, it is said (p. 492) :

Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense. * * *

And in the same opinion, it is stated that even where "hard consequences" would otherwise result, no warrant exists for avoiding them "by importing into a contract an ambiguity which otherwise would not exist, or, under the guise of construction, by forcing from plain words unusual and unnatural meanings." See also *Calderon v. Atlas Steamship Co.*, 170 U. S. 272, 278-281; *Lamborn v. Nat'l Bank of Commerce of Norfolk*, 276 U. S. 469, 473; *Robbins v. Rollins*, 127 U. S. 622, 633; *Hammon Consol. Gold Fields v. Powell*, 32 F. (2d) 855, 857; rehearing denied, 33 F. (2d) 898 (C. C. A. 9th); *Henrietta Mills, Inc. v. Commissioner of Internal Revenue*, 52 F. (2d) 931, 934; *Chicago, R. I. & P. Ry. Co. v. Maryland Casualty Co.*, 75 F. (2d) 596, 599; 6 *Ruling Case Law*, Section 232; *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 132 Ky. 7, 116 S. W. 234.

Furthermore, the intention appears clear to exclude the insured's estate from participation, not only in the insurance benefits but also in any refund of premiums. Paragraph 1 (a), entitled "Payment of Premiums" (R. 36), provides specifically that premiums paid in advance beyond the month during which maturity occurs, "shall be refunded to the Insured, if living; *otherwise to the beneficiary.*" Paragraph 11 (R. 37) provides that "any premiums paid after receipt of due proof of total permanent disability and within the six months, [(prior to receipt of such proof)] shall be refunded without interest"; and the next succeeding paragraph (11a) provides for the refund of premiums paid subsequent to the date of so-called presumptive total permanent disability.

While it is true that paragraphs 11 and 11a, *supra*, do not specify to whom the premiums paid by the insured subsequent to permanent total disability shall be refunded in the event of his death, there would seem to be no reason why the same disposition of those premiums should not have been intended as of the premiums paid in advance beyond the month of death and of the insurance benefits, both of which, as previously stated, are payable to the beneficiaries.

It is quite evident, we submit, that one of the purposes sought to be accomplished by the policy was to enable an insured, by designating the beneficiaries of his insurance, to prevent any of the

funds payable under it from being assessed for costs of administration as part of his estate or from falling into the hands of his creditors or of other persons not designated as beneficiaries, who might otherwise share in them against his wishes as distributees of his estate. Indeed, this would afford the only means by which he could prevent an estranged wife, from whom he was not divorced, from participating in such funds at his death as a part of her dower or statutory share in his estate, since he could not do so by will. Moreover, that purpose, insofar as it affects his creditors, is entirely consistent with the policy inherent in the provision of Section 22 of the World War Veterans' Act, 1924, as amended (38 U. S. C. 454), that such insurance "shall not be subject to the claims of creditors of any person to whom an award is made." The policy, it is true, provides in paragraph 15, entitled "Assignment", that the proceeds thereof "shall not be subject to the claims of creditors of the insured, or creditors of any beneficiary to whom the proceeds may be awarded"; but it is submitted that this provision would not prevent participation by the insured's creditors in any of the proceeds which might be paid to his estate. See *Pagel v. Pagel*, 291 U. S. 473.

The Comptroller General, in a decision rendered June 27, 1922 (1 Comp. Gen. 756, 760), held with reference to a policy of converted insurance, substantially similar in terms to the policy of the in-

stant case, "that in case of death of the insured before any award of disability insurance has been made to him his death vests in the beneficiary the right to all insurance covered by the policy, and there is thereafter no legal basis for an award of disability insurance, and no right in the estate of the insured or in the beneficiary to refund of premiums collected for any period prior to the death of the insured."

In a subsequent opinion rendered 4 months later (2 Comp. Gen. 292, 295), it was held that premiums paid subsequent to due proof of total permanent disability "should be returned to the estate of the decedent." The first decision has evidently been followed in administering this insurance, not only as to the payment of insurance benefits (See opinion of the General Counsel of the Veterans' Bureau dated April 25, 1924, approved by the Director May 6, 1924, appendix, *infra*, pp. 19-20, which was affirmed by the Comptroller General, 4 Comp. Gen. 284), but also as to the disposition of premiums. See the letter dated September 7, 1934 of the Acting Solicitor of the Veterans' Administration to counsel for the plaintiff (R. 26, 27). It is submitted that the long-continued, administrative interpretation with reference to the payment of the insurance benefits is entitled to great weight and should be adopted in the instant case, especially since it would seem to be entirely consistent with the plain meaning of the language used in the

policy. See *Garrison v. United States*, 7 Wall. 688; *White, Receiver, v. United States*, 241 U. S. 149; *District of Columbia v. Gallaher*, 124 U. S. 505, 510; *Boyett v. United States*, 86 F. (2d) 66, 68 (C. C. A. 5th).

The Comptroller General appears to have varied his interpretation of the policy with reference to whether premiums subject to refund are payable to the insured's estate or are to be retained by the Government. As already indicated, a refund of such premiums to the estate of the insured would seem contrary to the language and evident purpose of the policy. Furthermore, retention of such premiums by the Government would seem inconsistent with the mandatory provisions in paragraphs 11 and 11a that they "shall be refunded." It would also result in an unjust enrichment of the Government. Such premiums, having been paid subsequent to the maturity of the policy by permanent total disability (*Boyett, supra*, page 68), are not earned and no reason appears why the insured should forfeit them.³

³ It is true that the policy evidently provides for a forfeiture of premiums paid subsequent to permanent total disability and more than 6 months prior to due proof of such disability, but that provision was evidently inserted for the purpose of inducing the prompt submission of due proof; a purpose which, however, would not be served in any way by providing for a forfeiture of unearned premiums paid subsequent to the date of due proof.

CONCLUSION

In conclusion, it is submitted that the trial court erred in awarding either insurance benefits or a refund of premiums to the plaintiff in her capacity as personal representative of the insured, and that therefore the judgment should be reversed.

PEARSON M. HALL,
United States Attorney.

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
FENDALL MARBURY,
Special Assistants to the Attorney General.

MARCH 1937.

APPENDIX

APRIL 25, 1924.

The GENERAL COUNSEL
The DIRECTOR.

CONFLICTING DECISIONS OF COMPTROLLER GENERAL RELATIVE TO ACCRUED INSTALLMENTS OF CONVERTED INSURANCE

This matter has been given further consideration in conference with the Assistant Directors in Charge of the Claims and Insurance, and Finance Services, it being finally agreed to follow certain suggestions of the General Counsel as to the disposition of the question.

It appears that the confusion in this matter has arisen from the following circumstances: On November 10, 1921, the Comptroller General rendered a decision to the effect that installments of converted insurance accruing before the death of the insured on account of permanent total disability, but unpaid at the date of death, were payable to the personal representative of the insured and not to the death beneficiary of the policy. The Comptroller General's attention was directed to the fact that a certain provision of the converted policy seemed to expressly provide that all installments not actually paid to the insured during his lifetime should go to the death beneficiary. To this the Comptroller General, on February 4, 1922, replied as follows:

I am of the opinion that the decision of November 10, 1921, rightly decided as a matter of law generally that any unpaid installments of such insurance which may accrue to the insured because of his permanent total disability before his death are payable to the personal representative of his estate and not to the death beneficiary of the policy. *Whether or not any installments of converted disability insurance have in fact accrued to an insured at the time of his death depends upon the terms of the policy which he then held.*

* * * * *

The provision of the policy is that monthly installments of disability insurance shall be payable to the insured and shall continue to be so payable so long as he lives is subject to the qualification in the provision for disability benefits "except as hereinafter provided." The after provision of the policy is that the beneficiary shall receive as death benefit the full number of monthly installments provided by the policy, less only such installments as have been "paid to the insured during his lifetime." The exception quoted together with this after provision of the policy clearly limits disability benefits under the policy to such installments only as are paid to the insured during his lifetime. There is no provision that installments which had accrued to the insured shall be paid to the beneficiary.

Accordingly I now decide that these provisions of the policy are legal and that they fix clearly and definitely the rights of the insured and of the beneficiary, respectively, in the whole amount of the insurance, and

exclude the personal representatives of the insured from any right whatever in the insurance provided in the policy.

Thus, while reaffirming the decision of November 10, 1921, the Comptroller General really rendered it inoperative by holding in substance that the installments in question did not in fact, under the exception quoted, accrue to the insured if he died without receiving them.

The decision of January 17, 1924, in considering an entirely different question, again states the rule laid down in the decision of November 10, 1921, and cites that decision, but in no way repudiates the qualification of the rule contained in the decision of February 4, 1922. This later decision goes no further in affirming the decision of November 10, 1921, than did the decision of February 4, 1922, by which *the effect* of the said decision was completely annulled. It would appear, therefore, that the language used in the decision of January 17, 1924, in no way changes the situation as it existed previously, and that the Comptroller General's decision of February 4, 1922, is still in force and may be relied on by the Claims and Insurance Service as heretofore.

WILLIAM WOLFF SMITH,
General Counsel.

May 6, 1924.

Approved: F. T. H., *Director.*